

No. 14405

IN THE
United States
Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA
Appellant

vs.

ROBERT V. H. SUGDEN AND
JEAN S. SUGDEN
Appellees

APPELLANT'S REPLY BRIEF

Appeal from the United States District Court,
District of Arizona

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ARGUMENT

The Government does not intend to burden the Court with a lengthy reply brief, but in the excellent brief of Appellees their counsel have raised certain points and issues which the Government feels must be answered.

First, the Government must take issue with the learned counsel for defendants (appellees) when they state in Appellees' Brief, at page 15, that there is no claim of any improper physical operation of defendants' radio station. The record shows that witness Stratton was sent by Washington to investigate a suspected illegal use of radio (T.R. 34); he was to listen

to radio transmissions to see if the radio station of defendants was being used for an authorized purpose (T.R. 35) Mr. Stratton did monitor the defendants' radio station, and he confirmed the fact that the radio station was being operated for an illegal purpose (T.R. 39). A Federal Grand Jury heard Mr. Stratton's testimony and that of other witnesses (TR. 40, 41, 54 and 59), and as a result of that testimony the Grand Jury returned indictments against defendants one of which (C-11,554-Phx), is on appeal here, and it specifically charges defendants with conspiring to conceal illegal immigrants and accomplishing this object by use of radio broadcasting.

It is the contention of the Government that there is ample evidence of the defendants' illegal operation of their radio station, and this illegality brings this case under the reasoning and decision of this Court in *Casey vs. United States*, C.C.A.9, 191 F. 2d. 1. This position is buttressed by the fact that defendants were unlicensed operators throughout three of the four monitorings which establishes these cases as strikingly similar in fact situation to the *Casey* case.

Counsel for the defendants seek to pass off the unlicensed operation by defendants as inconsequential and as innocent misguidance. The Government does not propose to argue the contention as to defendants' claim of misplaced confidence—these are matters for a trial jury. The issue in this appeal is the effect of defendants unlicensed operation. Counsel for defendants argue that the lack of a license is a formal and technical point which should not act against the defendants' claim of protection under Section 605 of Title 47. It must be remembered that Section 318 of Title 47 requires that radio operators be licensed. The language of this section is plain and unambiguous, and the intent behind this

provision is made even clearer when the purpose of the Act, as stated in Section 301 of Title 47, is announced to be, among other things, the maintenance of control by the United States over all the channels of interstate and foreign radio transmission. The intent of Congress seems clear.

The evidence indicates that the defendants have broadcast without radio operators' licenses, have broadcast to effectuate an illegal purpose, yet defendants ask this Court to cloak them with the protection of Section 605. The Government contends that the defendants have no standing to claim the rights of the statute until they have performed the duties.

Secondly, the Government opposes the construction which counsel for defendants has placed on the Communications Act concerning the power of the Federal Communications Commission to monitor radio broadcasts. Counsel for defendants argues that the Communications Act evidences no intent that the Commission is authorized to intercept radio communications for the purpose of determining if the sender is engaged in an unlawful project; further, that the Commission is limited to matters of technical administrative control of radio communications; lastly, that the first *Nardone* case (*Nardone v. U.S.*, 302 U.S. 379) has settled the question of whether the Commission can monitor and disclose its information.

The issue of whether the Commission can monitor has never been decided by any appellate court, to the knowledge of Government counsel. The Supreme Court in *Nardone* and the several wire tapping cases was not presented with the specific issues presented in this appeal, and hence those cases are not controlling. In the wire tapping cases the issue was whether Section 605 applied to federal officers tapping telephone lines. In

the present case the issue concerns the Commission's power to monitor radio signals. The crux of the case rests upon an interpretation of the powers of the Commission under the Communications Act.

In *National Broadcasting Co. v. United States*, 319 U.S. 190, the Supreme Court took the view that the Commission had the power to determine the composition of radio transmission, and the Government believes that this applies to small broadcasters as well as national broadcasters. A careful study of the Act must necessarily bring one to this conclusion.

Opposing counsel argue that the limited grounds for revocation of station and operators licenses show that the Commission has no power to determine by monitoring whether a station is operating an unlawful project. It must be pointed out that violation of the Commission's regulations and wilfull operation contrary to the license are grounds for revocation. In order for the Commission to determine whether the operators are adhering to regulations and whether they are broadcasting within the sphere of the license requires that the Commission listen to the contents of the broadcasts. There is no limitation stated that these matters are limited to deciding whether the station has correct call letters and so on, but the matter goes beyond this, for the Commission is directed to ascertain whether the station is operated in compliance with its license. The operation of a radio for an illegal purpose is certainly not a purpose authorized by a license issued by the Commission.

Nor does the fact that the Commission may not censor broadcasts in any way indicate an intent by Congress that the Commission should not monitor broadcasts. Freedom of speech is preserved in radio broadcasting, but an abuse of this freedom can be the subject

of a criminal investigation the same as criminal libel, perjury, soliciting the overthrow of the government, disturbing the peace, etc. Liberty is maintained in radio broadcasting but blank license to violate the law is not contemplated.

But of major importance in this case is Section 303 (n) of the Act, Counsel would pass this section off as a false premise; nevertheless this section gives the Commission power to determine whether a station licensed under the Act is operating in conformance with the provisions of any Act. The Government believes that this broad provision was consciously and deliberately placed in the Act by Congress in order that the Commission might exercise control over improper and illegal radio broadcasting. Counsel for defendants read this provision, however, as limiting the Commission's power to acts it is authorized to enforce. But this position gives them no comfort, for the defendants were operating under the Communications Act, one which the Commission is certainly authorized to administer, with a station license authorizing radio broadcasting for farming purpose, and the defendants operated contrary to this license by using the radio to facilitate the hiding of illegal immigrants. The Commission assuredly had the authority and duty to investigate this matter to determine that the defendants were illegally using radio broadcasting. It is the contention of the Government that the only possible and practicable method of determining such an illegal use of radio is by monitoring, and Congress must have intended that the Commission make use of monitoring in order to inspect a radio station in operation. Support to this position is found in the fact that Congress has continued each year to appropriate money for the Commission's monitoring activities since 1927.

Taking a view of the Communications Act as a whole and the continuance of Congressional appropriations for monitoring, the Government is compelled to argue that Congress intends that the Commission continue to monitor radio broadcasts; and it is further contended that Congress intended the Commission should make use of the contents of radio broadcasts in enforcing the Communications Act or divulging such information to other agencies when such broadcasts violate the provisions of any Act.

CONCLUSION

The defendants have disregarded the duties placed upon them by the Communications Act, but they now demand the rights and protection of that same Act. The Government respectfully urges that the defendants be denied such standing under the Act.

Finally, the Government urges that its construction of the powers given to the Communications Commission be adopted as presenting the intent of Congress on the subject.

The Government realizes that personal liberties are to be held most dear and guarded zealously by the courts, but of equal importance is the obligation of the Government and courts to protect its citizens from crime and criminals. Law violators have not been slow to make use of all the advantages of science, and it is a continual struggle that law enforcement officers wage to protect the citizenry from the new schemes and methods of the lawless. The medium of radio is in this instance the subject of use for illegal ends, but by monitoring defendants' radio broadcasts such illegal use was frustrated. The Government contends that the methods and procedures followed in these cases were authorized by statute and did not violate the rights of the defendants under the law.

The Government respectfully urges the judgment of trial Court be reversed.

Respectfully submitted,

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